IN THE

Supreme Court of the United States

October Term, 1974

No. 74-304

RICHARD A. GORDON, individually and as President of INDEPENDENT INVESTOR PROTECTIVE LEAGUE, an incorporated association, and in behalf of the membership thereof and in behalf of all persons similarly circumstanced,

Petitioners,

against

NEW YORK STOCK EXCHANGE, INC., AMERICAN STOCK EXCHANGE, INC., and MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. and BACHE & COMPANY, INC., individually and as representatives of all member firms of the New York Stock Exchange and American Stock Exchange,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE RETIREMENT BOARD OF THE TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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BRIEF OF THE RETIREMENT BOARD OF THE TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

The Retirement Board of the Teachers' Retirement System of the City of New York ("Retirement Board") respectfully submits this brief as *amicus curiae,* and urges

reversal of the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 28, 1974.

Question Presented

The central question presented by this case is whether the practice of the nation's stock exchanges of fixing and enforcing schedules of minimum brokerage commission rates is subject to the scrutiny of an antitrust court.

Put another way, the question is whether the Securities Exchange Act of 1934, 15 U.S.C. §78a, et seq. (the "1934 Act"), because it permits the Securities and Exchange Commission ("SEC") to review exchange commission rate rules, among other things, impliedly repeals the antitrust laws to the extent they might affect the "fixed commission rates" charged by exchange members.

Interest of the Retirement Board

The Retirement Board administers the Teachers' Retirement System of the City of New York, pursuant to Chapter 20, Title B, of the Administrative Code of the City of New York, under which it is vested with the responsibility for the investment of substantial annuity and pension funds for the benefit of more than 95,000[1] active and retired public school teachers and administrators in the City of New York.

1. As of June 30, 1974.

The total pension funds administered by the Retirement Board are in excess of $2.4 billion of which approximately $843 million[2] is invested in common stock in connection with a Variable Annuity Program in which over 75% of the teacher members participate. Because of the wide diversity of the investments made in connection with its Variable Annuity Program, as required by law,[3] the extremely large volume of funds administered by it,[4] and a conservative investment portfolio dictated by public policy, the Retirement Board deals almost exclusively through member firms of the New York Stock Exchange, Inc. ("NYSE") and the American Stock Exchange, Inc. (collectively, the "Exchanges"), which Exchanges are the primary markets for the public sale of securities.

For a number of years the Retirement Board has believed that the minimum brokerage commission fees fixed by the Exchanges are at an artificially high level in view of the actual cost of the services provided. It has long been the Retirement Board's belief that brokerage commission should pay only for the execution of trades, and that the size of the commission should be governed only by the costs of execution. However, the rigid rate structure imposed by the Exchanges includes in the established commission fees the cost of a wide spectrum of services which

2. Market value as of June 30, 1974.

3. Administrative Code of City of New York §B20-57.0d.

4. Although the dollar volume of transactions executed on behalf of the Retirement Board on the New York and American Stock Exchanges exceeded $185 million for the fiscal year ended June 30, 1974, most of that amount consisted of transactions of less than $300,000, as to which Exchange rules prohibit negotiated commission rates. Even in transactions exceeding the $300,000 cut-off, however, Exchange rules permit negotiated rates only as to the portion in excess of the cut-off. New York Stock Exchange Constitution, Article XV, §§2, 4.

are ancillary to trading execution or brokerage, whether or not a customer takes advantage of such services.[5]

In an effort to retain their share of the brokerage business, the member firms of the Exchanges have developed the practice of providing ancillary services to customers which go beyond the brokerage function. These services must somehow be paid for. It was inevitable that the firms would offset the cost of these services by utilizing a portion of the commissions received. This has led to inflated commission rates.

While the Retirement Board strongly advocates a fully competitive brokerage commission structure, it has felt obliged to avail itself of such ancillary services to ameliorate to some extent the harsh impact of the existing rate structure. It has been forced, in other words, to take unnecessary services in an effort to get some value for its beneficiaries' money. Thus, not only does the fixed minimum brokerage fee structure have a damaging impact on the retirement benefits of a large class of public employees by compelling payment of fees for extraneous services, but it also results in an unreasonable restraint on competition on the part of the Exchanges in that it facilitates the control by their member firms over the brokerage-related service industries.

As the custodian and administrator of substantial investment funds held for the benefit of public employees the Retirement Board has an interest in challenging the practices of the Exchanges and their members which it believes

5. *See,* Note, *The New York Stock Exchange Minimum Commission Rate Structure: Antitrust on Wall Street,* 55 Va. L. Rev. 661, 663 (1969). These ancillary services include the safekeeping of customer securities, collection of dividends, forwarding proxy materials, furnishing investment advice and obtaining market quotations.

impinge unlawfully on the integrity of the investment programs under its aegis.

The District Court and Court of Appeals below held that the courts do not have jurisdiction to entertain an antitrust attack on the fixed minimum commission structure of the Exchanges. The Retirement Board takes the position that this result is contrary to the general public interest and to the interests of the members of the Teachers' Retirement System of the City of New York, that it is not consistent with the purposes and policies of the federal securities laws, and that it is not necessary to make the Securities Exchange Act work. Further, this holding leaves investors with no forum in which to challenge effectively the practice of price-fixing in the brokerage industry and may have the effect of foreclosing court challenge of other industry practices as well.

Statement of the Case

This private antitrust action was instituted on April 2, 1971 by Richard A. Gordon against the New York Stock Exchange, Inc., the American Stock Exchange, Inc. and two representative member firms of the Exchanges. The complaint has been treated by the courts below as well as all the parties, as a "broadside attack on the present commission structure of the Exchanges"[6] under the Sherman

6. See the District Court decision herein, 366 F. Supp. 1261, 1262 (S.D.N.Y. 1973). The Court of Appeals characterized the claim "that the exchange practice of fixing commission rates violated the Sherman Act" as the "principal allegation" of the complaint. 498 F.2d 1303, 1305 (2d Cir. 1974). Respondents' Statement in Support of the Issuance of a Writ of Certiorari (at p. 2) describes the complaint as a challenge to the Exchanges' practice of fixing minimum commission rates as an "illegal price fixing conspiracy."

Act, 15 U.S.C. §§1, 2, and the Robinson-Patman Act, 15 U.S.C. §13(a). The suit, which was brought by petitioner on his own behalf and on behalf of a class of investors alleged to have been injured by Exchange practices, seeks injunctive relief as well as damages.

On December 4, 1973 the District Court for the Southern District of New York (Lasker, J.) granted respondents' motion for summary judgment and dismissed the complaint on the ground that the court lacked subject matter jurisdiction, jurisdiction to entertain an antitrust attack on the fixed minimum commission structure of the Exchanges, since the fixing of commissions falls within a congressional policy of exchange self-regulation embodied in §19(b) of the 1934 Act, 15 U.S.C. §78s(b).

The Court of Appeals (per Kaufman, C.J.) affirmed the District Court's ruling, holding that under the rationale of this Court's opinion in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963) (Justices Stewart and Harlan dissenting), the oversight authority of the SEC pursuant to §19(b)(9) of the 1934 Act, 15 U.S.C. §78s(b)(9), gives rise to the antitrust immunity, and that the history, language, and policies of the 1934 Act manifest a congressional intent to exempt from the antitrust laws the Exchanges' practice of fixing minimum commission rates.

Summary of Argument

I The courts have been reluctant to find implied antitrust exemptions.

A. An antitrust exemption will not be implied unless a regulatory agency is responsible for performing the antitrust function. Nothing in the regulatory scheme under the 1934 Act requires the SEC to perform the antitrust function in its regulation of securities exchanges. A different case is presented by the Maloney Act, 15 U.S.C. §78o-3, under which the SEC regulates national securities associations.

B. SEC review of exchange activities is not so "pervasive" as to require an antitrust repealer. A principal purpose of the 1934 Act was to limit the self-regulatory conduct of exchanges. The "review" authority over exchange rulemaking conferred upon the SEC by §19(b) of the 1934 Act, 15 U.S.C. §78s(b), is confined within very narrow limits. The SEC has formally exercised its authority under §19(b) only infrequently. No mention is made in the statutory scheme of *minimum* fixed commission rates.

II A. "Self-regulatory" conduct of securities exchanges is immune from the antitrust laws only to the minimum extent necessary to make the 1934 Act work. *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). A determination that the SEC has review authority over exchange commission rates does not dispose of this case,

but is merely the first step of inquiry required under the *Silver* doctrine. The cases interpreting *Silver* and recent reports of Congressional Subcommittees adopt this view.

B. Antitrust immunization of exchange price-fixing practices is not necessary to make the 1934 Act work. The District Court failed to make an evidentiary determination of such necessity. The determination of whether antitrust repealer is necessary in a given case is to be made by the courts and not the SEC. Fixed commission rates are not necessary for the achievement of the objectives of the 1934 Act.

III Ouster of antitrust jurisdiction will leave petitioner's class with no effective redress of its claims. The SEC has exercised its supervision over exchange ratemaking largely by informal action not subject to judicial review. Antritrust ouster will discourage meritorious private challenges to excessive exchange practices.

ARGUMENT

I

Neither the statutory framework nor the legislative history of the Exchange Act demonstrates a congressional intent to immunize fixed commission rates from antitrust challenge.

Because of the paramount importance of fully competitive markets in our national economic policy as expressed in the Sherman Act, 15 U.S.C. §§1-7, express exemptions from the antitrust laws have been narrowly con-

strued by the courts. Implied exemptions have rarely been found. This Court has repeatedly declined to find a legislative intent that a congressionally enacted regulatory scheme displace the antitrust laws in the absence of an unambiguous declaration of Congress to that effect. *See, e.g., Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *California* v. *FPC*, 369 U.S. 482, 485 (1962); *United States* v. *Radio Corp. of America*, 358 U.S. 334 (1959); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945); *United States* v. *Borden Co.*, 308 U.S. 188 (1939).

The 1934 Act does not contain any express repealer of the antitrust laws. To the contrary, §28 of the 1934 Act, 15 U.S.C. §78bb, expressly preserves "the rights and remedies that may exist at law or in equity." This would include the remedies provided by the antitrust laws. Thus, if any repealer of the antitrust laws is to be found with respect to the conduct and practices of securities exchanges subject to the 1934 Act, it must be implied from the statutory language or legislative history.

A finding of such implied repealer with respect to the price-fixing practices of the Exchanges would appear to contravene this clear statutory language preserving existing remedies. Even in the absence of such language, a finding of implied repealer would not be justified.

As this Court said in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963):

> "Repealers of the antitrust laws by implication from a regulatory statute are strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."

No such demonstration of irreconcilable conflict has been made in regard to the price-fixing practices of the Exchanges being challenged in this case.

A. The 1934 Act does not empower the SEC to perform the antitrust function.

In determining whether an antitrust exemption should be implied because of a broad regulatory statute, this Court has listed several important criteria. First, an exemption will not be implied unless the regulatory agency is responsible for enforcing some "competitive standard clearly delineated by [statute]." *United States* v. *Philadelphia Nat'l Bank, supra,* 374 U.S. at 351. This Court has followed a clear policy of refusing to oust the courts of antitrust jurisdiction in favor of a regulatory agency, unless the agency has a congressional mandate to perform the antitrust function. In *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959), in which an exchange of television stations was attacked as violative of the Sherman Act, it was contended that the Federal Communications Commission was vested with primary jurisdiction to determine the controversy. The Court, in rejecting this argument, held that the Commission lacked the statutory power to determine antitrust controversies since its supervisory powers were based on a broad standard of "public interest," convenience, and necessity rather than on antitrust criteria. Similarily, in the case of *California* v. *Federal Power Commission,* 369 U.S. 482 (1962), this Court held that the FPC lacked statutory authority to adjudicate anti-

trust issues and therefore could not pre-empt the Court's antitrust jurisdiction.[7]

There is nothing in the regulatory scheme under the 1934 Act which requires, or even permits, the SEC to perform the antitrust function in its regulation of securities exchanges. The most that can be said is that the SEC has the authority to intervene in exchange activities "for the protection of investors or to insure fair dealing in securities * * *." 15 U.S.C. §78s(b). This direction to enforce fiduciary standards certainly does not amount to a mandate to the SEC to weigh antitrust factors in its regulation of the Exchanges. There was no finding by either of the Courts below as to what weight the SEC has attached to antitrust factors in its "review" of exchange price-fiixng practices, or, indeed, as to whether the SEC has taken antitrust considerations into account at all. Clearly an inquiry on a determinative issue was omitted.

The absence of antitrust language in the sections of 1934 Act which provide for the regulation of securities exchanges takes on a special significance when viewed in the light of certain of the Act's other provisions, specifically the Maloney Act, 15 U.S.C. §78o-3. Under the Maloney Act, a 1938 amendment to the 1934 Act, the SEC is vested with regulatory supervision of national securities associations, such as the NASD. The Maloney Act expressly exempts such securities associations from the application of conflicting laws, 15 U.S.C. §78o-3(n). Further, the Maloney Act demonstrates that Congress has *expressly pro-*

7. While these cases involved the issue of primary jurisdiction rather than antitrust repealer, they are closely analogous to the case at bar and their reasoning is persuasive.

vided review standards which perform the antitrust function where it has intended a regulatory scheme administered by the SEC to be exempt from the operation of the antitrust laws.[8] The Maloney Act, §15A(b)(8), 15 U.S.C. §78o-3(b)(8), sets forth as a requirement for the registration of national securities associations with the SEC the promulgation of rules which

> "• • • are designed • • • to provide safeguards against unreasonable profits or unreasonable rates of commissions • • • and to remove impediments to and perfect the mechanism of a *free and open market;* and *are not designed* to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, *to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions,* allowances, discounts, or other charges." (Emphasis added.)

It has been noted with regard to the Maloney Act that "both the exemption language and the antitrust standards manifest a congressional intent to insulate national securities associations from the antitrust laws while the Exchange Act's regulation of the NYSE and other organized securities exchanges is devoid of either type of exempting provision." Note, *The New York Stock Exchange Minimum Commission Rate Structure: Antitrust on Wall Street,* 55 Va. L. Rev. 661, 683 (1969).

This disparity between the Maloney amendment of 1938 and the other provisions of the 1934 Act was recognized by

8. Despite these statutory provisions, at least one court has refused to imply an antitrust repealer with respect to the Maloney Act. *See, Harwell* v. *Growth Programs, Inc.,* 451 F.2d 240 (5th Cir. 1971), opinion on rehearing, 459 F.2d 461 (1972), *cert. denied,* 409 U.S. 876 (1972).

this Court in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). The Court, holding that certain practices of securities exchanges were not exempt from the scrutiny of an antitrust court, noted that "there is nothing built into the regulatory scheme which performs the antitrust function. • • •" *Id.* at 358. The Court then noted that a different case as to antitrust exemption would be presented by a statutory scheme which provided a vehicle through which the antitrust function could be exercised. The Maloney Act was cited by the Court. *Id.* at 358, n. 12, and 360.

B. The 1934 Act's regulatory scheme is not sufficiently "pervasive" to insulate commission rate fixing from antitrust review in the courts.

A second criterion by which this Court has determined whether the Congress has intended a partial repealer of the antitrust laws in a regulatory statute is the "pervasiveness" of the regulatory scheme established. *See, e.g.,* Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries,* 111 U. of Pa. L. Rev. 46, 48, 57-59 (1962). In its analysis of the 1934 Act in the *Silver* case, this Court held that "the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws," and that if antitrust repealer is to be implied with respect to a specific limited area of exchange activity, it must be done on a case by case basis and only after careful analysis. 343 U.S. at 360-361.

The Exchanges and the SEC have taken the position that SEC "review" authority under §19(b) of the 1934

Act and the scheme of self-regulation suggested by §19(b) demonstrate a congressional intent to oust the courts of antitrust jurisdiction with respect to the areas of exchange activity enumerated in §19(b). However, an analysis of the statutory language of §19(b) and of the historical context in which it was promulgated demonstrates that no such result was intended by the Congress. The self-regulation, which had traditionally been exercised by the exchanges, was by no means created or enshrined by the 1934 Act; rather, the purpose of that legislation was expressly to *limit* the self-regulatory conduct of the exchanges and to control certain excessive practices to which the securities industry had proven vulnerable. As is pointed out in Comment, *An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered,* 65 Nw. U.L. Rev. 260, 281-82 (1970):

> "Since Congress was disappointed with the performance of self-regulation in the securities industry, it used the 1934 Act to place self-regulation under governmental supervision. Professor Loss concludes that self-regulation was adopted not as a substitute for legislation and direct supervision but as a supplement to such forces."

After an analysis of the historical context of the 1934 Act, the comment concludes (pp. 283-284):

> "Congressional concern was with activities of the exchange members who had previously participated in fraudulent practices and unethical dealings rather than with activities of the exchanges as entities in themselves. This leads to the conclusion that *self-regulation was relied on to supplement government supervision of the markets for securities, but that self-regulation was not expected to have a significant role in the supervision of the market for brokerage services.*" (Emphasis added)

Clearly, the price fixing practices of the exchanges constitute a restraint on competition in "the market for brokerage services," and thus are not sanctified by a purported "mandate" of self-regulation in the 1934 Act.

Moreover, the "review" authority over exchange rule making which is conferred upon the SEC by §19(b) is confined within very narrow limits and certainly does not suggest a "pervasive" statutory scheme from which an antitrust repealer could be implied. Under the limited review provisions of §19(b), the SEC is authorized by rule or by order to "alter or supplement the rules" of any exchange, after written request to the exchange and opportunity for hearing upon the Exchange's refusal.

However "pervasive" the SEC's powers under §19(b) may be thought to be, it is clear that the SEC has exercised such powers only infrequently. As of 1971 the SEC had formally used its §19(b) authority only twice, and on only one of those occasions did it go through a full §19(b) proceeding. Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange,* 80 Yale L. J. 811, 815, n. 32 (1971). This is not the type of statutory scheme or agency oversight which would justify the ouster of the jurisdiction of the antitrust court.

While §19(b) does give the SEC limited review authority in the area of exchange commission rates ("reasonable rates of commission"), no mention is made in the statutory

scheme of the practice of fixing minimum commission rates. It is true, as the respondents and the SEC have argued, that the practice of fixing minimum commission rates has been employed by the New York Stock Excange since its founding in 1792. But the longevity of such practices does not shield them from antitrust scrutiny. As the Court of Appeals for the Second Circuit said in another context, "even where a defendant is successful in showing that it has followed a customary course in the industry, the first litigation of such a practice is a proper occasion for its outlawing if it is in fact in violation." *Chasins* v. *Smith, Barney & Co.*, 438 F.2d 1167, 1171 (2d Cir. 1970).

As has been demonstrated above, the chief purposes of the 1934 Act were the protection of investors from deceptive practices in the securities industry and the limitation of self-regulation by the exchanges. Given the primary concerns of Congress in drafting the 1934 Act, it is not surprising that little attention was paid to the fixing at minimum commissions. An early draft of the 1934 Act contained the phrase "uniform rate" rather than "reasonable rate," which appears in §19(b)(9) as promulgated. H. R. 7852, 73d Cong., 2d Sess. (1934). At the congressional hearings on the proposed provisions of the 1934 Act, Samuel Untermeyer, who had served as counsel in an earlier congressional investigation of stock exchanges, urged that the word "uniform" be stricken, stating: "As matters now stand, the Exchange can charge all that the traffic will bear, and that is a burden upon commerce." Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., pt. 16, at 7705 (1934). A similar sentiment was expressed in the report of the Pecora investigation, undertaken in connection with the promulgation of the 1934 Act, which concluded that "the cost to the American public of maintaining the securities market has been staggering." S. Rep. No. 1455, 73d Cong., 2d Sess., p. 6 (1934). As finally enacted, §19(b)(9) sets forth a standard of "reasonable rates of commission." In light of this legislative history, the most that can be said is that Congress intended to give the SEC a measure of control over exorbitant brokerage commission rates but to leave the practice of fixing minimum rates of commissions within the scrutiny of existing statutes and laws, including the antitrust laws.

II

Under the *Silver* doctrine, "self-regulatory" conduct of securities exchanges subject to SEC review is immune from antitrust laws only to the minimum extent necessary to make the 1934 Act work. Immunization of price-fixing schemes is not necessary to make the Act work.

A. Antitrust repealer will be implied only to minimum extent necessary.

The courts below determined that antitrust challenge to the price-fixing practices engaged in by respondents is not within the subject matter jurisdiction of the District Court since the Exchanges operate under a regime of self-regulation subject to the "review" authority of the Securities Exchange Commission pursuant to Section 19(b) of the Act, 15 U.S.C. §78s(b).

In arriving at their determination, both lower courts relied on certain elements of the analysis of this Court in

Silver v. *New York Stock Exchange,* 373 U.S. 341 (1963), the leading case setting forth the criteria to be applied in reconciling the policies of the antitrust laws and the 1934 Act. However, we submit that the approach used by the courts below omitted several of the most critical inquiries required by the doctrine of the *Silver* case, inquiries which, if pursued, may well have led to a different result.

Although this Court recognized in *Silver* that the exchanges have a duty of "self-regulation" whose dimensions are suggested by §19(b) of the 1934 Act, 15 U.S.C. §78s(b), it held unambiguously that acts or practices of the exchanges are not immunized by the 1934 Act from antitrust attack merely because they come within the rubric of "self-regulatory" conduct. A further analysis is required. The Court held that "repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only the the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." 373 U.S. at 357. Elaborating on this "necessity" standard for repealer, the Court further stated the principle that "[E]xchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act * * *." *Id.* at 361.

Similarly, the determination of the courts below that the SEC has authority pursuant to §19(b)(9) of the 1934 Act, 15 U.S.C. §78s(b)(a), to "review" the commission rates fixed by the Exchanges is by no means dispositive of the issues of this case, but is merely the first step of the

comprehensive inquiry required under the doctrine of *Silver.*

It is true, as the courts below point out, that the specific exchange practices which were challenged in the *Silver* case, and which this Court held to be reviewable by an antitrust court, were not among those specifically enumerated in §19(b) of the 1934 Act, 15 U.S.C. §78s(b) as being subject to SEC "review." Seizing on this apparent distinction, both courts below found that the case at bar presented the "different case," on which the *Silver* Court reserved decision, since the challenged Exchange practices came within the purview of SEC "review" under §19(b).

In the case law interpreting the *Silver* decision, it has been established that the test of antitrust immunity of an exchange practice is not whether it falls within one of the enumerated categories of §19(b), but rather whether the "close analysis and delicate weighing process mandated by * * * *Silver*"[9] compels the conclusion that immunity is necessary.

The leading case is *Thill Securities Corp.* v. *New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied* 401 U.S. 995 (1971). *Thill* involved an antitrust challenge to NYSE's "anti-rebate" rule, which prohibited its members from sharing brokerage commissions with non-members. The District Court in *Thill* concluded that the anti-rebate rule was an integral part of the commission rate structure, which was subject to SEC review under §19 of the 1934 Act and, on that ground granted defendant's mo-

9. Dissent of Mr. Chief Justice Warren to denial of certiorari in *Kaplan* v. *Lehman Brothers,* 389 U.S. 954, 957 (1967).

tion for summary judgment, holding the rule to be immune from antitrust attack. Reversing, the Court of Appeals for the Seventh Circuit held (433 F.2d at 269, 271):

> "[We] find in the teachings of *Silver*, no intimation that the mere possibility of SEC review wraps the conduct of the Exchange in an impregnable shield of antitrust immunity." (p. 269)
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> "• • • [E]ven the fact that the SEC may be exercising its proper supervisory power over the rules of the Exchange does not in and of itself cloak the Exchange with antitrust immunity for its conduct relating to those rules." (p. 271)

The Court of Appeals emphasized the teaching of *Silver* that "before a court may abdicate its jurisdiction on the antitrust issue the defendant must establish its anticompetitive conduct as justified because it is necessary for the operation of the Securities Act." *Id.* at 273.

The *Thill* exigesis of *Silver* was followed in the Fifth Circuit in the case of *Harwell* v. *Growth Programs, Inc.*, 451 F.2d 240 (5th Cir. 1971), *opinion on rehearing*, 459 F.2d 461 (1972), *cert. denied*, 409 U.S. 876 (1972). In *Harwell*, which involved an antitrust challenge to a rule adopted by the National Association of Securities Dealers, the Court was faced with the task of reconciling the policies of the antitrust laws and the Maloney Act. Despite the fact that the Maloney Act provides that its provisions shall prevail whenever they are in conflict with other laws, 15 U.S.C. §78o-3(n), the *Harwell* Court, following the analysis of *Silver*, held that in reconciling the statutory schemes, "the Maloney Act should be construed to reach only those things

necessary to carry out the purposes of the Act." 451 F.2d at 247. Relying on the *Thill* decision, the Fifth Circuit in *Harwell* rejected the contention that the NASD action was immune from antitrust attack merely because the NASD "acted under close supervision of the SEC." *Ibid.*

The *Thill* result and rationale was also followed in the recent opinion, in *Fredrickson* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 5 CCH Trade Reg. Rep. 1974-2, Trade Cas. ¶75,227, p. 97,529 (N.D. Ill., Sept. 9, 1974), which was handed down subsequent to both of the lower court opinions below. In *Fredrickson*, which involved yet another antitrust attack on the price-fixing practices of the exchanges and their members, the Court noted that the fixing of minimum commission rates is among the areas of exchange rulemaking where the SEC may intervene and that, upon the record before the court, it appeared that the price-fixing practices of the exchanges has been "closely watched" by the SEC. Nevertheless the Court, after a lengthy discussion of the decision of the Second Circuit in the instant case, specifically rejected the reasoning of that decision. The Court, denying defendants' motion in *Fredrickson* to dismiss or in the alternative to stay the action pending reference of the matter to the SEC,[10] grounded his decision on the "necessity" standard of *Silver*, stating (at p. 97,534):

> "• • • [M]y obligation in this case is to determine if the minimum commission rates complained of are necessary to make the Securities Exchange Act of 1934 work, and to determine if these rates are being applied to the minimum extent necessary."

10. Defendants have filed a petition, still pending, for leave to appeal to the Seventh Circuit.

The Second Circuit in the present case refused to apply the above principle established by *Silver, Thill,* and their progeny in reconciling the 1934 Act with the antitrust laws. It thus rejected not only the compelling rationale of those opinions but also statements of unqualified approval of the *Thill* interpretations of *Silver* published by two congressional committees with jurisdiction over securities legislation.[11]

For example, the Report of the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, Securities Industry Study, 92d Cong., 2d Sess. (1972) (hereinafter "House Securities Industry Study") states that the *Thill* interpretation of *Silver* "is clear and is correct, both as to what the law is and as to what the law should be" (pp. 160-161).

A similar statement of approval of the doctrine of *Silver, Thill,* and *Harwell* was expressed in the Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, Securities Industry Study (1973) at p. 227.

The Courts below specifically rejected the rationale of the *Thill* decision and failed to discuss the holding of *Harwell.* Instead, they appeared to rely primarily on the decision in *Kaplan* v. *Lehman Brothers,* 250 F. Supp. 562 (N.D. Ill. 1966), *aff'd,* 371 F.2d 409 (7th Cir. 1967), *cert. denied,* 389 U.S. 954 (1967). In *Kaplan,* exchange price fixing practices were attacked as a *per se* violation of the

11. These statements were presented to the attention of the Court of Appeals in the *Amicus* Brief of the Justice Department (Justice Br.) at pp. 16-17.

antitrust laws. As did the courts below, the *Kaplan* courts made only the preliminary determination that the exchanges had a duty of self-regulation with regard to the fixing of commission rates subject to SEC "review" under §19(b) of the 1934 Act, without proceeding further, as required by *Silver,* to consider whether the practice of fixing minimum commission rates was "necessary" to effectuate the policies of the 1934 Act.

We submit that the *Kaplan* decision was overruled *sub silentio* by the Seventh Circuit in its subsequent decision in the *Thill* case,[12] and that, in any event, the *Kaplan* result is inconsistent with the doctrine of the *Silver* case. Accordingly, to the extent that it followed the *Kaplan* decision, the decision of the Second Circuit in this case is in error.

B. Ouster of antitrust jurisdiction of the courts to pass upon the legality of Exchange price-fixing practices is not necessary to effectuate the policies of the 1934 Act.

Despite the clear guidelines set down by this Court in *Silver* and followed in several of the Circuits, neither court below directly confronted the issues of whether repeal of the antitrust laws as applied to price fixing practices in the brokerage industry was, in fact, necessary to make the 1934 Act work, or whether such repeal was the least restrictive method of reconciling the policies of the antitrust laws and the 1934 Act.

As the *Silver* decision clearly teaches, neither SEC review authority over exchange activities, nor the ex-

12. This position is taken in the House Securities Industry Study at p. 160.

changes' duty of self-regulation, gives rise to an automatic execption from the antitrust laws. 373 U.S. at 360-61. Any argument that there is necessarily an implied antitrust repealer with respect to a particular area of exchange activity is merely an affirmative defense to an antitrust action, as to which the antitrust defendant has the burden of proof. *Thill, supra,* 433 F.2d at 273; *Fredrickson, supra,* at p. 97,534. Following the *Silver* decision, the *Thill* court held that the affirmative defense of "necessity" could only be made out upon evidentiary showing of facts demonstrating such "necessity." The Court of Appeals in *Thill* held that the defendant exchange there had the burden of presenting evidence of the beneficial effects of the anticompetitive conduct complained of, evidence of the existence of provisions in the regulatory statute which performed the antitrust function, and evidence showing that the exchange rule there challenged should be preserved as necessary to make the 1934 Act work. Finding the record before it lacking in such a presentation and falling "woefully short of the meticulous analysis called for in *Silver,*" the Court of Appeals reversed the order of the lower court granting summary judgment and remanded it for further proceedings consistent with its holding. *Thill, supra,* 433 F.2d at 270.

The *Thill* result is equally appropriate in this case. The factual presentation required to sustain the affirmative defense of exchange immunity with respect to price fixing practices was not made here. Therefore, we submit, the order granting summary judgment below was improper. This Court made it clear in its decision in the *Silver* case that the determination of whether an antitrust repealer is

necessary to effectuate the policies of the 1934 Act is a determination to be made, in each particular case, by the courts and not by the regulatory agency. Referral of such questions to an agency is therefore improper. The *Silver* opinion states (p. 360),

> "[U]nder the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act."

In the *Fredrickson* case, Judge Parsons reaffirmed the role of the courts in performing antitrust analysis, stating (Trade Reg. Rep. at p. 97,534):

> "It would be an anomaly to direct the plaintiffs here to the SEC when the agency has sanctioned by its own action or inaction the alleged violation of the antitrust law. If I were to remand this case to the SEC, I would be requiring the plaintiffs to seek from the regulators an admission of their failure to properly regulate."

Judge Parsons concluded (*ibid.*):

> "This question of implied repeal is ultimately one for this court, though prior SEC deliberations are of essential assistance.
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> While it is clear that the view of the SEC regarding its experience with Exchange Commission rates may be valuable in an antitrust analysis and that some deference ought to be paid to SEC views, it is equally clear that such views are not binding on the antitrust court."[13]

13. The House Securities Industry Study notes that there is little danger of losing the benefit of SEC experience in these matters, since the courts are regularly apprised of the SEC's views through *amicus* briefs, SEC intervention, and other means. p. 160.

There is no reason to fear a conflict between the courts and the SEC on rate matters, if it is held that the courts may exercise antitrust review jurisdiction over minimum commission rates. The courts and the SEC have different areas of responsibility. As the *Thill* Court correctly stated (433 F.2d at 273):

> "* * * [Congress'] purpose in passing the Act and the primary responsibility of the SEC thereunder is to protect investors. It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. Congress and our Supreme Court have directed the courts to employ this expertise unless the court in a given case concludes that its employment will frustrate the goals of the regulatory scheme."

This is not a case requiring such a conclusion.

There is no "obvious basis" for which the conclusion can be drawn that fixed minimum commission rates are necessary to make the Securities Exchange Act work. Baxter, *NYSE Fixed Commission Rates: A Private Cartel Goes Public,* 22 Stan. L. Rev. 675, 693 (1970). Professor Baxter, in analyzing the relationships which "cartelized" commission rates bear to the broad objectives of the 1934 Act, examined the following objectives:

(1) the promotion of broker fidelity to customers;

(2) the prevention of manipulative schemes;

(3) the protection of investors by insuring broker solvency;

(4) the facilitation of industry efficiency; and

(5) limited exchange self-regulation.

In each case, he concluded that "cartelized" commission rates were not necessary to the achievement of these objectives. We submit that Professor Baxter's analysis has a persuasive bearing on the main issue of this case.

The argument that commission rates fall within one of the areas of commission self-regulation enumerated by section 19(b) of the 1934 Act does not speak to the issue of the "necessity" of shielding Exchange practices in that area from antitrust scrutiny. The list of Exchange activities set forth in section 19(b) in no way constitutes a regime which is central to the great purposes of the 1934 Act. The §19(b) enumeration is largely a compilation of routine business practices which Congress found to be most practically regulated by permitting the exchanges in the first instance to promulgate the appropriate rules. Thus, the rule-making power of the exchanges extends not only to the "fixing or reasonable rates of commission" but to such matters as "* * * (4) hours of trading; (5) the time and method of making settlements, payments, and deliveries and of closing accounts, the minimum units of trading * * * (10) minimum deposits on margin accounts; * * * and (13) similar matters." 75 U.S.C. §78s(b). It is incredible to suggest that the Congress intended a regime such as this to oust the courts of antitrust jurisdiction.

Moreover, the actual operation of the fixed minimum commission structure of the exchanges directly contradicts the notion that price fixing is essential to the regulatory scheme under the 1934 Act. As the *Thill* Court observed in reversing an order granting summary judgment (433 F.2d at 273-274):

> "* * * [I]t is difficult to conceive how the Exchange can on remand argue that the antirebate rule is 'neces-

sary to make the Act work' when its members have gone to imaginative extremes to circumvent the rule when it serves their private economic purposes to do so."

This observation applies with equal force to the fixed minimum commission rate structure here at issue.

III

Ouster of antitrust jurisdiction will leave petitioner's class with no effective redress of its claims.

In justifying its holding that there was an implied repealer of the antitrust laws as to exchange practices encompassed within §19(b) of the 1934 Act, the Second Circuit remarked that petitioner would ultimately have access to the courts by way of a judicial review of any SEC action or order pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§702, 704, or under the provisions of the 1934 Act, 15 U.S.C. §78y. We respectfully submit that the decision of the Second Circuit leaves petitioner's class with at best an illusory mode of redress.

It has been said:

"The absence of formal hearing procedures and opportunities for public comment in SEC approval of NYSE rules, the limited provisions for judicial review under section 25 of the 1934 Act, and the absence of any provision for injunctive relief or treble damages, which are available under the [Sherman] Act, combine to suggest that the relief available under the 1934 Act is inadequate to provide just remedies for those injured by anticompetitive activities." (footnotes omitted)

Comment, *An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of*

the Securities Industry Reconsidered, 65 Nw. U. L. Rev. at 321.

See, also, generally, Note, *Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange,* 80 Yale L.J. 811.

This conclusion is borne out by the recent history of SEC practice relative to the exchange rules being challenged herein. As we have previously noted, the SEC has formally invoked its powers under §19(b) of the 1934 Act on only two occasions. When it has exercised its review powers in respect of exchange commission rates on any informal basis, the SEC has contended that such action is not reviewable by the courts and the Second Circuit has upheld this contention.[14]

It must also be taken into consideration that the regulation of claims such as are raised here to SEC jurisdiction will have the effect of discouraging future meritorious challenges of exchange anticompetitive activities.[15]

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14. See, Justice Br. (at p. 20) and Appellant's Brief to Court of Appeals (at p. 8) for their discussion of *Independent Investor Protective League* v. *SEC* (2d Cir. No. 71-1924, dismissed without opinion, January 1972).

15. The House Securities Industry Study persuasively argues:

"The Securities and Exchange Commission can, and has, litigated cases which have lasted for a considerable length of time. Thus if the Commission were given initial review power, the Subcommittee fears that a person who might otherwise seek to challenge exchange action, when dated with the enormous amount of time and money such a challenge might cost, and the difficult task of persuading the agency to reverse a previous decision, might simply not make the challenge at all. We believe that such a result would be undesirable since, as we pointed out earlier, private antitrust actions have proved to be the only effective vehicle for inhibiting or challenging exchange excesses." pp. 166-167.

Finally, the salutary effect of private antitrust challenges must be emphasized. As the District Court Judge in the *Thill* case said, the institution of an antitrust action "makes everyone move. The very fact this lawsuit is pending I am sure has had some impact on the Commission and on the Exchange and on this whole area."[16]

Conclusion

For the foregoing reasons, we submit that the Court of Appeals improperly affirmed the order of the District Court granting summary judgment. We respectfully urge that the decision of the Court of Appeals be reversed and that the case be remanded for further appropriate proceedings.

Respectfully submitted,

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16. *Thill Securities Corp.* v. *New York Stock Exchange*, E.D. Wis. Civil Action File No. 63-C-264, transcript of proceedings, February 10, 1972, p. 82.